(4)

91-770



Case No. _____

UNITED STATES SUPREME COURT

1991 Term

**JOSEPH C. KIRCHDORFER, INC.**

**Petitioner**

**v.**

**DONALD B. RICE, SECRETARY OF THE AIR FORCE,**

**Respondent**

---

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

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**APPENDIX**
**VOLUME III**

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specifications, one of the Government inspectors called the National Woodwork Manufacturers Association (NWMA). The inspector discovered that SKI's door supplier was not certified to build doors to the standards required by the specifications. SKI never supplied any certification for the doors.[13] (SR4, tab 98 reports 2-3; tr. 9/23-27, 193, 202-03, 11/211-13, 222-24).

166. Throughout the contract, the parties disputed whether the door louvers had been sealed with caulk at the factory. The lack of caulk on door louvers appeared on the punchlists for many units. On at least one occasion, the Government project manager attempted to settled the dispute by removing the louver from a door installed by SKI. The louver had no caulk. Mr. Skip Kirchdorfer also had a louver removed on

at least one occasion and the louver was caulked. We conclude that SKI's supplier was inconsistent in caulking the louvers (tr. 2/48, 11/173-74; R4, tabs, 74, 92).

167. Throughout the contract, the parties were in dispute about the front entrance doors supplied by SKI. The doors had a window in them (referred to as a light). Some of the units required a door that opened from the left and some of the units required a door that opened from the right. SKI ordered all of its doors to open from the left. Therefore, when the left swinging doors were installed in united needing a right handed door, the screws that secured the door light in place were exposed to the outside. The Government considered this to be a security problem. The defect appeared on the punchlists for many of the units. SKI's proposed solution to

the problem of caulking over the screw heads was rejected by the Government as a maintenance problem for when any maintenance needed to be performed on the lights, the screws would not be visible. SKI never corrected the problem. After the termination, the Government removed the lights and reversed the installation, a solution which SKI had refused to do because it alleged that the lights were embedded in caulk and could not be removed (tr. 7/155-56, 11/209, 214-15; SR4, tab 98 report 14; R4, tabs 78, 82, 92).

**ALUMINUM WINDOWS**

168. Section 08520 of the specification states:

> 4. SHOP DRAWINGS:
>
> Shop drawings of windows and screens shall be submitted to the Contracting Officer for approval. Shop drawings shall indicate location and elevation

> of each type and size of window and shall show full size sections, thickness and gages of metal, fastenings, proposed method of installation and anchoring, the size and spacing of anchors, . . . [s]hop drawings shall also show details of the connections between new windows and the various interior building finishes adjoining the windows.
>
> 12. INSTALLATION:
>
> . . . Window frames or closures shall be securely anchored to the supporting construction, in accordance with approved shop drawings and installation instructions. . . . After installation, the perimeter of all windows shall be sealed watertight with sealant as specified in Section 07920, "Caulking and Sealants."

(R4, tab 5)

169. The shop drawings submitted by SKI for the aluminum windows, and approved by the Government, called for 3 fasteners at the head of each window ("2 per head 6" from end and one centered") and 4 fasteners at each jamb[14] (tr. 9/30-31; exh. G-1).

170. Throughout the contract the Government noted that SKI was not installing the windows in this manner and SKI disputed that these fasteners were required and refused to install the windows in this manner. This defect was noted on many of the punchlists for the units (tr. 11/89-92; exh. G-1; R4, tabs 74, 78, 82, 92; SR4, tab 120).

171. While the insufficient number of window fasteners was mentioned at almost every inspection, on 4 September 1985, Mr. McDonald told the Government that SKI would not correct the problem because SKI believed the number of window fasteners were sufficient and in accordance with the shop drawings. SKI never installed the proper number of window fasteners (SR4, tab 97 report 30; tr. 11/209-10, 13/218-20).

**DOOR THRESHOLDS**

172. Section 8705 of the specification states:

> 10. MISCELLANEOUS ITEMS FOR DOORS:
>
> a. Door Shoes and Thresholds. New metal door shoes and thresholds shall be installed at new exterior doors. . . . [a] bead of caulking compound shall be applied on the interior of the outer flange and at each end of each door shoe before installation of shoe, to seal the shoe watertight. Thresholds shall be cut to fit jambs and set in a bead of caulking compound.

(R4, tab 5)

173. On 25 July 1985, a Government inspector told SKI that it was not caulking the length of the thresholds. Mr. McDonald denied that caulking was required but pointed out that in any event there was a vinyl strip on the thresholds that took the place of caulk. The Government approved of the use of the vinyl strip as long as the manufacturer approved it in its literature. There was

a second caulking problem, however. The Government also states that the ends of the thresholds were not being caulked. SKI contends that while it did not caulk the ends of the thresholds prior to inspections, that it did so during the inspections (app. requested finding of fact 791) (SR4, tab 96 report 24; tr. 11/196-98).

174. By 5 August 1985, SKI had not provided the Government with a copy of the manufacturer's literature on the vinyl strip and the Government requested it again (SR4, tab 97 report 2).

175. On 12 August 1985, at the inspection of 102 Palm, the Government stated that caulk needed to be applied under the threshold. The lack of caulk at the door thresholds was noted on many of the units' punchlists (SR4, tab 97 report 8; R4, tabs 74, 92).

**SHOWER ENCLOSURES**

176. Section 10800 of the specification, Bathroom Accessories, states:

> 5. INSTALLATION
>
> . . . [a] continuous bead of waterproof sealant, of type recommended by the enclosure and door manufacturer, shall be applied to existing jambs and still prior to installation of metal frames. Excess sealant which is exposed after frames are installed shall be removed.

(R4, tab 5)

177. On 23 July 1985, it was discovered that the original shower enclosures delivered to the job site were the wrong size and had to be returned (tr. 11/2000, 13/210-11; SR4, tab 96 reports 22-23).

178. On 19 August 1985, Mr. McDonald informed the Government that the replacement shower enclosures had been

shipped but had been lost en route (SR4, tab 97 reports 15-16).

179. The shower manufacturer's instructions required SKI to install a neoprene gasket on the vertical flange of the panel and door section of the shower enclosure. SKI did not do this and many of the shower enclosures leaked, despite the fact that SKI did caulk them. The improper installation of the shower enclosure was noted on many of the units' punchlists (R4, tabs 82, 92; tr. 11/201, 12/21-22, 14/280-81).

180. During the contract, Mr. McDonald contended that the neoprene seals were not required and were not available. After the termination, the Government inspectors found the neoprene seals along with the manufacturer's instructions on installing them in SKI's warehouse (tr. 13/211-13, 14/65).

**WINDOW SHADE CORDS**

181. Section 12510 of the specifications, Shades and Traverse Rods, states:

> 6. MATERIALS:
>
> a. Window Shades . . . . Shades shall be furnished complete with roller, cords, brackets, screws and all accessories required for a complete installation.

(R4, tab 5)

182. The parties request us to find many facts regarding the dispute over pull cords on the shades but we find it unnecessary to go through the many submittals, removal and return of the shades and the improper cutting of shade lengths. The fact is that the shades that SKI supplied did not have pull cords, the Government noted the fact on the punchlists, SKI did not install them, the specifications required them, and the

Government never waived the requirement (tr. 11/86-87, 149-51, 187-88, 209, 13/210, 220-21; SR4, tab 98 report 14; R4, tabs 78, 82, 92).

**RANGE HOODS**

183. Section 16050 of the specification states:

> 6. KITCHEN RANGE HOODS:
>
> A new range hood shall be provided in the kitchen in all housing units included in this contract . . .

(R4, tab 5)

184. On 19 July 1985, Mr. McDonald reported to the Government that the range hoods received for the Palm Circle units were the wrong size and would have to be returned (SR4, tab 96 report 19).

185. On 28 August 1985, Mr. McDonald reported that the range hoods received for Palm Circle were too big to be installed. This shipment also had to

be returned. A third shipment of range hoods was the correct size but SKI never installed them, despite their absence being noted on many of the units' punchlists (SR4, tab 97 reports 23-24; tr. 11/82-84; R4, tabs 74, 78, SR4, tab 120).

CONTENTIONS OF THE PARTIES

ASBCA No. 32637 - Termination for Default

SKI advances seven theories upon which it requests that the Board overturn the termination for default:

1. That the contracting officer had inaccurate facts when rendering his decision and therefore the decision was defective.

2. That the contracting officer did not exercise his independent judgement in rendering his decision.

3. That the Government's alleged failure to provide direction to SKI justifies SKI's failure to perform.

4. The termination was procedurally defective.

5. The contract could not be terminated for "late delivery."

6. The termination was made in bad faith.

7. The alleged deficiencies in SKI's work were not a valid basis for the default termination.

The Government's position is that SKI's work was generally deficient and that when notified of its deficiencies, SKI refused to correct them. The Government denies any over inspection or failure to cooperate, and alleges that SKI simply failed to prosecute the contract work in a manner that would result in completion of the contract by

refusing to perform proper quality control, refusing to correct work, and by stopping work. The Government denies the contracting officer's decision to terminate was improper in any respect.

ASBCA No.35074 - Delay Claim

SKI's position is that the Government delayed it between 1 November 1984 and 1 July 1985 and 7 August 1985 and 30 December 1985 (388 days) by an incorrect interpretation of SP-14, by proposing modifications, by refusing to allow SKI to begin work on 25 March 1985, by suspending progress payments, and by wrongfully interpreting what "on hand and ready for use" meant.

The Government argues that it correctly interpreted SP-14 and that the delay resulted from SKI's own failure to accept the Government's direction to

begin work on Palm Circle and to plan and manage the work.

## DECISION

### PRELIMINARY MATTERS

The pre-trial phase of these appeals could hardly have been more contentious. There were approximately 60 pre-trial motions filed by the parties. We deal below with the two motions which we deferred ruling on until the decision on the merits, and also with a post-trial motion.[15]

### APPELLANT'S MOTIONS FOR SUMMARY JUDGEMENT

On 21 February 1989 and 1 March 1989, shortly before the scheduled hearing of these appeals, SKI filed motions for summary judgement as to the termination for default (ASBCA No. 32637) and for 120 of the 388 day delay claim in ASBCA No. 35074. Because there was insufficient time prior to the scheduled

hearing date to allow the Government to respond and the Board to issue decisions, and because the hearing had been continued a number of times, the Board deferred ruling on the motions until this decision. A discussion of the motions would be a waste of resources. Suffice it to say that summary judgement is not a proper vehicle to dispose of these appeals. Of the 1,077 requested findings of fact in SKI's main post-trial brief, 996 are designated by SKI as "disputed." The motions are denied.

APPELLANT'S MOTION TO STRIKE

During the hearing, one of the Government's witness, on cross examination, gave an inconsistent answer to a question from the answer he gave in his deposition. The witness explained that a possible reason his deposition answer was inconsistent with his

testimony was that at times during the deposition he was not permitted to look at his daily reports. He did not know if this was one of these instances. Counsel for appellant represented that he never refused the witness the opportunity to look at his daily reports during the entire deposition. Government counsel was given leave to file those pages of the deposition in which the Government contended that such did occur (tr. 13/12-25). The Government filed three pages. Appellant then moved to strike the pages filed by the Government as non-responsive because they dealt with appellant's counsel's instructions to the witness at the deposition not to look at documents other than his daily reports. Appellant's counsel is correct and we consider it established that the witness was not denied access to his daily

reports during the deposition. There is no need, however, to strike the Government's filing and the motion is denied.

TERMINATION FOR DEFAULT - NO. 32637

We start with the well known proposition that a termination for default is regarded as a claim by the Government and as such the burden is upon the Government to prove that circumstances existed that permitted it to terminate the contract for default. In this case, where the contract was terminated for failure to make progress, the Government has the burden of proving:

> ...that at the time of termination action the contracting officer had a reasonable, valid basis for concluding, on the basis of the entire record, that there was no reasonable likelihood that appellant could perform the entire contract effort within the time remaining for contract performance.

RFI Shield-Room, ASBCA Nos. 17374, 17991, 77-2 BCA Par. 12,714 at 61,735; see also, Lisbon Contractors, Inc. v. U.S., 828 F.2d 759 (Fed. Cir. 1987).

As is developed in the course of the following discussion, we hold that the Government has met its burden of proving that there was no reasonable likelihood that the contractor could perform the entire contract within the time remaining for contract performance and we have found no excuse for such lack of performance. We turn now to an examination of each of the reasons SKI alleges should cause us to convert the termination for default to a termination for convenience of the Government.

SKI's first ground for arguing that the termination for default was not valid is its contention that the contracting officer did not have complete and

accurate facts in reaching his decision to terminate. We start our analysis by observing that the TCO was supplied with a large amount of information by the PCO and his associates (e.g., R4, tab 90). SKI makes much of the fact that the TCO did not personally visit the site. We know of no requirement that a TCO visit a site and are convinced that the TCO was supplied with ample information upon which to base his decision. SKI was afforded an opportunity to present whatever information it wanted to the TCO and took advantage of that opportunity to a limited extent.

SKI relies heavily on its allegation that the TCO was not advised that SKI was making an "active effort" to cure the defects and therefore a termination for default was not proper.[16] Cervetto Building Maintenance Co. v. U.S., 2 Cl.

Ct. 299(1983). Quite aside from the obvious question of why SKI did not advise the TCO of the particulars of its "active efforts" to cure the defects, the record reflects quite a different story. By the time the PCO referred the contract to the TCO for default consideration, SKI had failed to request any inspections for over a month, performed virtually no work for over a month, laid off most of its employees over a month beforehand, told the Government it was removing its warehouse and demobilizing, and removed equipment and material from the worksite. How this translates into an "active effort" to cure defects escapes us.

SKI's attack on the information supplied to the TCO as faulty or inaccurate consists of discussions of inconsequential matters or merely facts and opinions with which SKI has a

different viewpoint than the Government. We have found no attempt to mislead the TCO nor any defect in the TCO's factual considerations that would justify overturning the termination for default.

SKI's second argument for overturning the termination for default is its contention that the TCO did not exercise his independent discretion in making the termination decision. Schlesinger v. U.S., 182 Ct. Cl. 571, 590 F.2d 702 (1968). We have nothing in this appeal that even hints of a Schlesinger situation. Our observation of the TCO at the hearing and consideration of his testimony convinces us that he independently considered all the pertinent facts and circumstances in arriving at his decision. A careful reading of SKI's argument in its brief reveals that it merely disagrees with the

conclusions reached by the TCO, not that someone else dictated those conclusions. Both the TCO and the PCO have a right, especially in technical areas, to seek (and follow if they are persuaded) the advice of their associates. Kit-Pack Company, Inc., ASBCA No. 33135, 89-3 BCA Par. 22,151; Max Jordan Baunternehmung, ASBCA No. 23055, 82-1 BCA Par 15,685; aff'd 10 Cl. Ct. 672 (1986). We perceive that the PCO and TCO did nothing unusual in this regard.

SKI's third basis for requesting that we overturn the termination for default is the alleged failure of the Government to provide SKI with clarification and direction, breaching its implied obligation not to interfere with the contractor's performance of the contract. Nanofast, Inc., ASBCA No. 12545, 69-1 BCA Par. 7566; Pacific

Devices, Inc., ASBCA No. 19379, 76-2 BCA Par. 12,179. We find SKI's protestations that the Government would not tell it how to correct the defects to be disingenuous.[17] The truth is, in most instances, Mr. McDonald did not agree with the Government's interpretation of what were defects and stated that SKI would not correct them. For example, nothing was required from the Government to allow SKI to submit evidence (as the contract required) that the doors complied with the specifications, and the Government had no obligation to develop an installation method for edge metal that would prevent "kickout." One of the reasons SKI was hired, was to exercise its construction expertise. Likewise, when the Government identified sagging soffits as a defect, it remained to SKI to install them without the sage, not for

the Government to direct SKI exactly how to fix the problem. As to expansion joints, SKI never submitted a proposed sealer and it was up to SKI to remedy the door lights that had screws on the wrong side. SKI merely had to follow its own shop drawings to determine where to place the screws in the window heads and it is incredible that SKI could not determine how to put pull cords on the window shades. All in all, it is clear to us that SKI did not, or could not, exercise the construction expertise it had been hired to exercise and instead wanted the Government to direct its every move. We reject SKI's contention that it did not understand what the defects were. The credible testimony was clear that the inspectors pointed out the defects to SKI personnel during the inspections, discussed the defects with them, and (in

all but one instance) provided a written record to SKI. SKI's correspondence (see particularly 2 October 1985 letter) demonstrates that SKI had a clear understanding of the defects but merely disagreed in many instances that the work was required. To the contrary, records concerning SKI's quality control inspections, acceptance inspections, or directions to its personnel to correct defects are almost non-existent. This problem was exacerbated by SKI' practice of requesting inspections by the Government when units were indisputably unfinished and, as near as we can determine, the absence of any organized quality control effort. As we observed in a similar situation, when a renovation contractor began t request inspections on units that were far from being even arguably completed:

[t]he Government must have come face-to-face with the realization at that point that [the contractor's] concept of what satisfactory performance was bore no relation to the specifications. The only credible explanations for [the contractor] offering units it knew to be incomplete are that it was trying to have the Government accept units not meeting contract requirements or it wanted the Government to perform the contractor's quality control function. LaCoste Builders, Inc., ASBCA Nos. 29884, 29957, 29966, 30085, 88-1 BCA Par. 20,360 at 102,890.

SKI's fourth reason for overturning the termination is that it was procedurally defective because the Government failed to give it proper direction on how to replace defective materials (see Inspection and Acceptance,

DAR 7-602.11 (1976 OCT) and Termination for Default-Damages for Delay-Time Extension, DAR 7-602.5 (1969AUG). We have found that the Government did not fail to properly clarify matters to SKI, so we reject this argument. SKI also contends pursuant to Raytheon Service Co., ASBCA No. 14746, 70-2 BCA Par. 8390, that the time period between the default and the actual termination was too long and that SKI continued to try and perform in the interim so that any delivery requirement was waived.[18] Factually, this assertion is incorrect. We found that after 17 September 1985, SKI all but abandoned the contract and there was no real continued performance by SKI. Finally, SKI argues that the cure notice did not put it on notice as to what the defects it was supposed to cure were. Putting aside the fact that the default

clauses in this contract does not require a cure notice, one only has to read SKI's 2 October 1985 letter and the daily reports and correspondence in the record to see that SKI was fully aware of the areas in which the Government considered its performance defective. The defects were well known, as well as the Government's contention that SKI was failing to prosecute the work diligently towards completion in a timely manner. In any event, a contractor who has notice of the defects in its performance by prior letter and conversations independent of a cure notice, is not prejudiced by the failure of the cure notice to state all the defects. RFI, supra. At the time of the PCO's 17 September 1985 cure notice, it can be hardly argued that SKI was diligently prosecuting the work for it had advised

the PCO on 13 September 1985 that it was demobilizing the contract. The 17 September 1985 cure notice gave SKI 10 days to cure its failure to diligently prosecute performance of the contract. As we found, subsequent to 17 September 1985, virtually no work at all was performed on the contract.

The next reason offered by SKI for overturning the termination for default is that the TCO testified that he did not consider SKI's alleged failure to meet the 15 day completion requirement of SP-14 as a basis for terminating the contract. We fail to see how this requires the termination to be overturned. The TCO testified that he terminated the contract for SKI's failure to make progress, not failure to deliver, in that it was his determination that SKI would never finish the contract work (tr.

10/12). Regardless of how SP-14 is interpreted (that is, whether there was a valid 15-day requirement for completion of each occupied unit or not) the fact remains that SKI did not finish any unit during the entire contract and was not making substantial progress toward completing the entire contract within the time frame required.

The sixth argument presented by SKI is that the termination for default must be converted to a termination for convenience because the termination for default decision was made in bad faith. In support of this theory SKI lists 41 "facts" that it alleges establish the Government's bad faith (app. main br. at 222-226). These 41 items are a list of every complaint SKI had on the contract. We have reviewed them and none establish that the termination for default decision

was made in bad faith and do not present, as alleged by SKI, well nigh irrefragable proof that "...the Government at Eglin intended, from early in the Contract, to cause financial harm to SKI and to create a basis to ultimately obtain a default termination. Kalvar Corp. v. U.S., 211 Ct. Cl. 192, 543 F.2d 1298, cert. den. 434 U.S. 830 (1976)." (App. br. at 227).

This last basis upon which SKI urges us to overturn the termination for default is that the deficiencies in SKI's work did not justify a termination for default. We have found that SKI had no organized quality control program. We saw no evidence of it in the record and the units presented to the program We saw no evidence of it in the record and the units presented to the government bore the fruit of SKI's practice of relying on the government inspectors to

perform the quality control function. Further, we found that Mr. McDonald consistently refused to correct valid items cited on punchlists. SKI then virtually abandoned the contract. It is abundantly clear to us that the CO had ample evidence based on the record to conclude that SKI's work was less than satisfactory and that SKI was not intending to correct it and that the contract was in danger of never being completed.

**ASBCA NO. 35074-THE DELAY CLAIM**

SKI claims a total of 388 days of delay, comprised on the period 1 November 1984 to 1 July 1985 and 7 August 1985 to 30 December 1985. The primary focus of SKI's delay claim is the government's interpretation of SP-14 that allegedly prevented SKI from starting work in Area I on Oak Drive. It must be observed that

SP-14, even without its modification in P00001, is difficult to work with and could benefit from a redrafting effort. We need not, however, go into the fine workings of the provision to determine the issues before us. It is SKI's contention that SP-14(d) which states, "[t]he area where the contract work shall begin will be designated by the government", did not give the government the right to designate the unit upon which work was to begin, but only the area in which work was to begin in. Quite apart from whether this distinction has any practical effect (for the government could have designated Area III to begin in under SKI's interpretation and still SKI should not have been able to start in Area I where it desired) we must look at what actually happened in this contract. First, we note that we

have little credible evidence as to what SKI planned at any time in the contract as to the sequencing of units.

Particularly, there is nothing to show what sequence SKI relied on in preparing its bid. In fact, in view of SKI's lack of documentation, we would be hard pressed to find that they had any sequence in mind at any particular time. Assuming, arguendo that SKI did bid the contract assuming it would start in Area I at Oak Drive and that assumption by SKI was reasonable and in accordance with the contract, SKI proceeded on this course despite being advised at the pre-construction conference on 23 July 1984 that the government wanted work to begin on Palm Circle. On 2 November 1984, SKI tried to dissuade the contracting officer from requiring work to start on Palm Circle. Subsequently, on 16 November

1984, SKI again argued with the government over starting on Palm Circle. Then on 6 December 1984, the contracting officer ordered SKI in writing, to commence work on Palm Circle and provided a house by house scheduling for performance of the contract work. Instead of immediately complying with the order or contacting the contracting officer, SKI ignored the direction and continued to operate as if it could start work on Oak Drive. SKI again on 12 March 1985 refused to obey the government's direction to begin work at Palm Circle and incredibly, on 25 March 1985, SKI gave the government notice that SKI would begin work at 102 Oak. The contracting officer thereafter directed SKI to begin work at palm Circle several more times in the following months until finally, on 6 June 1985, SKI accepted the direction to

begin at Palm Circle (albeit without all the necessary materials).[19] Even if the contracting officer was in error under Sp-14 in directing SKI to start on Palm Circle, SKI was on notice of the direction and was required to comply with the direction and file a claim for any increased costs. SKI was not free to ignore the direction and proceed to prepare to start work on Oak Drive. To the extent that starting at Palm Circle did delay SKI, it was the fault of SKI for failing to obey the directions of the contracting officer and for failing to order the material necessary for Palm Circle early on in the contract.

The next cause of delay alleged by SKI is the fact that the government proposed to modify the contract. SKI states that "SKI was prepared to begin work in Area 1 on 1 Nov 84 and would have

done so but for failure of the government to identify the type of door for Door No. 2." (app. main br. at 243). There is no evidence to support the assertion that SKI was ready to begin work on 1 November 1984 and we reject the assertion. We note that SKI did not even begin to construct its warehouse until 8 November 1984 and as of 14 January 1985, still had virtually no material at Eglin.

Thirdly, SKI contends that the government unreasonably refused to allow SKI to begin work on 25 March 1985. The government refused to allow SKI to begin work because SKI insisted on working on Oak Drive, contrary to the direction of the contracting officer to begin work at Palm Circle. In any event, SKI did not have the material "on hand and ready for use" for either Oak Drive or Palm Circle on 25 March 1985. There was nothing

unreasonable in the contracting officer's actions in insisting that SKI comply with the government's directions.[20] This insistence by the contracting officer did not delay SKI from 25 March 1985 until 1 July 1985 as alleged. What delayed SKI was its continued refusal to follow the direction of the contracting officer.

Next, SKI alleges that the government's discontinuance of progress payments (actually delayed payment of the April and May 1985 invoices until July 1985) caused "greater delay than would otherwise have occurred." This argument is based on the allegation that having bought the material for Area I, SKI was not financially able to buy the Area II material. We have found that SKI did not prove this financial inability. In any event, the reason SKI bought all the Area I material without buying the Area II

material is that it refused to obey the directions of the government to commence on Palm Circle. SKI seeks to cure its failure to prove its lack of financial resources by requesting a negative inference from the failure of the government to introduce evidence that SKI did have the financial resources. SKI is not entitled to such an inference. In the absence of probative evidence produced by SKI that it did not have the financial resources, it was not incumbent on the government to present such proof. Additionally, as we found supra, SKI never ever calculated what the cost of the additional materials required to start on Palm Circle instead of Oak Drive was.

Finally, SKI argues that the government's interpretation of that portion of SP-14 that requires that no

work be performed on occupied housing units unless " . . . . all materials are on hand and ready for use," is incorrect. SKI states:

> SKI could have complied with the Contract and begun work in March 1985. At that time SKI had all materials on hand necessary: substantial amounts of materials were ordered and scheduled to be shipped in time to comply with the 15-day completion requirement; all other materials, including cement and gravel were obtainable from local sources.

(App. main br. at 248).

We hold SKI's interpretation of "on hand and ready for use" to be incorrect. While the government did permit a relaxation in that portion of SP-14 in July 1985, the fact still remains that prior to that time, material was required to be on hand and ready for use. How material can be ready to be used on occupied units when it is in another state or not even purchased yet escapes

us. SKI would have us find that the government should have relied on Mr. McDonald's statements that materials were in inventory or being shipped and allowed construction to commence. A ready of our findings reveals that reliance on Mr. McDonald's representations on the status of material would not have been prudent action by the government. We hold that the government acted correctly and reasonably in its interpretation of "on hand and ready for use."

**CONCLUSION**

The appeals are denied.

Dated: 13 September 1990.

MARK N. STEMPLER
Administrative Judge
Member of the Armed Services Board of Contract Appeals

I concur

WILLIAM J. RUBERRY
Administrative Judge

Acting Chairman,
Armed Services Board
of Contract Appeals

I concur

ALAN M. SPECTOR
Administrative Judge
Vice-Chairman, Armed
Services Board of
Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract appeals in ASBCA Nos. 32637 and 35074 Appeals of Skip Kirchdorfer, Inc., rendered in conformance with the Board's Charter.

Dated: 14 Sept 1990

EDWARD S. ADAMKEWICZ
Recorder, Armed
Services Board of
Contract Appeals

**NOTES**

1.The three week trial of this appeal generated approximately 4,000 pages of transcript and 400 lengthy exhibits. At the conclusion of the trial, the presiding judge advised counsel that due to the length of the record which contained a tremendous amount of extraneous and repetitive material which the parties insisted on including in the record, that the Board was not going to search the record to find support for

either party's position on any issue. Counsel were advised to write clear, concise, cogent, correctly cited, and well supported briefs and that if the support for any proposition was not cited in the brief, and that if the support for any proposition was not cited in the brief, the Board would assume no support exists in the record for the assertion. Counsel responded with approximately 1,000 pages of briefs.

2.Mr. Skip Kirchdorfer is the president of SKI. His son, Scott Kirchdorfer, worked for SKI (tr. 5/94).

3.For ease of reference, we have used the paragraph structure as it originally appeared in SP-14.

4.Skip Kirchdorfer testified that he normally visited the site about every 2 weeks (tr. 4/7). The government contests this fact and from the record we cannot find that Skip Kirchdorfer was present with such a frequency. Mr. McDonald, SKI's project manager, from our examination of the record, was the only SKI representative on-site with regular frequency.

5. We have no evidence whether the title was a local purchase item or not.

6.It is unclear why the louvers were disapproved since they were the louvers requested by the project engineer (tr. 2/45-46).

7.SKI contends that it changed roofing subcontractors because of poor quality work. The former roofing subcontractor alleged to the government that its subcontract with SKI called for SKI to supply the roofing material and that SKI was not supplying the material needed and that the subcontractor terminated the subcontractor in July 1985 (Sr4, tab 96 report 22; SR4, tab 123; tr. 2/196, 11/179).

8.Mr. Skip Kirchdorfer testified that none of SKI's delay claim was in any attributable to occupants not being home or fences not being removed by occupants (tr. 5/47).

9.We do not deal with every problem the parties had, but the ones that appear from the record to be of consequence. We also do not, as is true throughout this opinion, recite and/or discuss all the evidence presented by each party on every point. We considered all the evidence but deem it unnecessary to discuss the thousands of pieces of conflicting evidence since much of it lack probative value or strains credulity.

10.Mr. Skip Kirchdorfer took a video tape of some of SKI's exterior work on 13 January 1986. The quality of the film, lighting and camera work is such that we can make no findings from the exhibit (exh. A-128). In February 1986, a representative of the surety (accompanied by appellant's counsel) made a videotape of some of the buildings under the contract. While the tape is of a better quality and clearly shows some of the

defects, it generally, because of lighting and angles, cannot be relied on (exh. A-127; tr. 7/142).

11.SKI's expert, from its surety, Mr. Curry, also thought that sagging and warped soffits were caused by the thickness of the plywood used (exh. A-108 (E)).

12.The reprocurement contract would take a common crimping tool and crimp two section sof the metal edge together to eliminate the kickout problem (tr. 10/113-15).

13.SKI argues that a 15 January 1985 letter from its supplier to SKi that was attached to SKI's door submittal is a certification. It is not. The letter merely confirms to SKI that the supplier will produce (not did produce) the doors in accordance with the specifications (exh. A-27). SKI also argues that the stamps on the door with the manufacturer's name, the type of wood and a "solid door" label were sufficient to be a certification (exh. A-123; tr. 12/227. They are not. SKI also argues that the standard limited door warranty it attached to a 2 October 1985 letter to the government is a certification. The warranty makes no certification as to any of the specifications of the contract whatsoever (R4, tab 96).

14.SKI contends that the shop drawings do not require three fasteners on each head. We conclude that the government's interpretation of the supplier's shop drawings is correct. While SKI's

position that it should have been required only to fill the pre-drilled holes in the windows has some appeal, the drawings appear clear in their instructions and SKI failed to introduce any evidence from the supplier that the drawings should be interpreted in any other way.

15.It is not clear to the Board, but it appears that throughout appellant's reply brief, filed almost a year after the hearing, it makes a multitude of evidentiary objections. To the extent that the objections were raised at trial, they were ruled on and our rulings are hereby affirmed. To the extent that these objections were not raised at trial, they are waived.

16.We point out here an aspect of SKI's brief that troubled us throughout our deliberations. That is, many of the citations and statements are non-existent, inaccurate and misleading. For instance, in this argument, SKI states:

* * *

> He [the TCO] further admitted that he automatically gave no credence to any representations from SKi and automatically presumed all representations of Eglin personnel to be accurate, complete and truthful.

* * *

> Because he [the TCO] regularly assumed contractors were dishonest

> and untruthful and government personnel were honest and truthful he did not make the reasonable investigation required of him as a matter of law.

(App. main post-hearing br. at 204).

The TCO did not testify in a manner that supports these assertions.

17.It is unclear how SKi squares this argument with its argument infra that it was not advised what the defects in its performance were.

18.This argument assumes that doctrine set forth in Raytheon applies to construction contracts. We have held that it does not. LaCoste Builders, Inc., ASBCA Nos. 29884, 29957, 29966, 30085, 8801 BCA paragraph 20,360 and cases cited therein.

19.We cannot determine from the record when all the material for Oak Drive was finally "on hand and ready for use" but we note that as late as 25 March 1985 SKI did not have the material for any unit under contract in their inventory.

20.While the government's reason for wanting construction to commence on Palm Circle does not appear to be substantial, the fact remains that it was the owner of the buildings and was entitled to direct SKi to proceed in any sequence it wanted, albeit at a higher cost if such direction was a change to the contract.